IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA, *ex rel.* JAMES F. ALDERSON, Plaintiffs,	)	
v.	)	Case No. 99-413-CIV-T-23B
QUORUM HEALTH GROUP, INC., *et al.,* Defendants.	)	

UNITED STATES' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE RELATOR AS A PARTY TO THIS CASE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

U.S. Constitution

Statutes and Rules

UNITED STATES' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE RELATOR AS A PARTY TO THIS CASE

The constitutional arguments made by Quorum Health Group *et al.* (collectively referred to as "Quorum"), to support its motion to dismiss the *qui tam* relator, James F. Alderson, are completely meritless, flying in the face of 135 years of established precedent and practice. Furthermore, the United States would not argue given the facts of this case that the relator should be barred by the "public disclosure" provisions of the False Claims Act, 31 U.S.C. § 3730(e)(4), from participating in this litigation.

1. Quorum's Arguments Challenging the Constitutionality of the *Qui Tam* Provisions of the False Claims Act Ignore Both History and Precedent.

It is important to note how radical Quorum's constitutional challenges are. The False Claims Act ("FCA" or "Act"), 31 U.S.C. § 3729 *et seq.*, has included *qui tam* provisions since its initial passage in 1863. *See* Act of March 2, 1863, ch. 67, § 4, 12 Stat. 698. Before that, "[s]tatutes providing for actions by a common informer, who himself ha[d] no interest whatever in the controversy other than that given by statute, ha[d] been in existence for hundreds of years in England, and in this country ever since the foundation of our Government." *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 541 n.4 (1943). The first Congress itself passed several statutes that included similar provisions,[1] and there are at least four other

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[1] *See, e.g.,* Act of March 1, 1790, ch. 2, § 3, 1 Stat. 101, 102 (census returns); Act of July 20, 1790, ch. 29, §§ 1, 4, 1 Stat. 131, 133 (seamen); Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137, 137-38 (Indians).

qui tam provisions currently in the United States Code.[2] In the 135 year existence of the FCA, exactly *one* court in a published opinion has found there to be a constitutional problem with the Act's *qui tam* provisions: a district court in the Southern District of Texas. *See United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 982 F. Supp. 1261 (S.D. Tx. 1997).[3] That ruling, which went against controlling precedent, *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 460 (5th Cir. 1977), is currently on appeal to the Fifth Circuit, No. 97-20948. But in the meantime, two other district court judges in the Southern District of Texas have rejected *Riley*, *see Hopkins v. Actions, Inc. of Brazoria Cty.*, 985 F. Supp. 706 (S.D. Tx. 1997); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp. 2d 1017, 1044-46 (S.D. Tx. 1998) (disagreeing with *Riley* "because it goes against 134 years of case law specifically concluding or assuming that the qui tam provisions are constitutional and/or that the relator has standing to bring the action even though the relator has suffered no injury"), and the Fifth Circuit has specifically disavowed *Riley*'s analysis in a separate case. *See United States ex rel. Foulds v. Texas Tech. Univ.*, 171 F.3d 279, 288 n.12 (5th Cir. 1999):

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[2] *See* 25 U.S.C. § 201 (penalties for violation of laws protecting commercial interests of Native Americans); 18 U.S.C. § 962 (forfeitures of vessels privately armed against friendly nations); 35 U.S.C. § 292 (penalties for patent infringement); 46 U.S.C. § 723 (forfeiture of vessels taking undersea treasure from the Florida coast).

[3] At least one other district court, in an unpublished decision, held that a relator lacked standing under the FCA, although the court did not assert there to be constitutional flaws with the FCA as a whole. *See United States and Weinberger v. Retail Credit Co.*, No. 75-526-Civ-WM (S.D. Fla.) ("This Court, then, in terms of Article III limitations on federal court jurisdiction does not believe that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.") (attached as Appendix A). This ruling was reversed on appeal. *See United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 460 (5th Cir. 1977).

> Our court has explicitly found that *qui tam* plaintiffs have standing. *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 460 (5th Cir.1977). As noted in a district court opinion concluding that relators lack standing, since our opinion in *Equifax*, the Supreme Court has refined its standing jurisprudence. *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 982 F. Supp. 1261 (S.D. Tex.1997). Yet, with regard to this issue, we consider persuasive a recent Supreme Court decision dealing with a qui tam issue under the False Claims Act. See *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997) (holding that portions of the 1986 amendments to the Act do not apply retroactively). The *Hughes Aircraft* Court did not raise any standing objections.[4]

The rogue *Riley* decision, though, is the sole basis for Quorum's four constitutional challenges to the FCA.

a. *Qui Tam* relators have standing under Article III of the Constitution

Quorum's standing argument, in sum, is that relators have suffered no cognizable "injury in fact" due to FCA defendants' fraud, which injures solely the United States, since the risks and rewards of litigation cannot count and the FCA never formally assigned the United States' interest in the litigation to *qui tam* relators. First, this misstates the question; the relator's independent injury is not a factor in the standing analysis for *qui tam* actions. Second, controlling precedent in this Circuit is otherwise. *See Weinberger*, 557 F.2d at 460 (informer had standing to sue under the FCA, despite not having standing under a variety of other statutes lacking *qui tam* provisions); *United States ex rel. Neher v. NEC Corp*, 11 F.3d 136,

[4] *Foulds* was decided on March 29, 1999. Quorum's memorandum in support of its motion to dismiss the relator, dated April 15, 1999, did not mention *Foulds*.

138 (11th Cir. 1994) (relator is injured directly in FCA *qui tam* actions).[5] Third, every other appellate court to address the issue whether relators have standing has held they do. *See, e.g., United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir. 1993); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993); *Foulds*, *supra*, 171 F.3d at 288 n.12. Finally, history, too, subverts Quorum's analysis – *qui tam* provisions have a long heritage, see *supra*, and as the Supreme Court recently said "Cases" and "Controversies" within the limits of the judicial power under Article III, § 2 of the Constitution "have always [been] taken ... to mean cases and controversies of the sort *traditionally* amenable to and resolved by the judicial process." *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1016 (1998) (emphasis added). *See also Mistretta v. United States*, 488 U.S. 361, 401 (1988) ("traditional ways of conducting government ... give meaning to the constitution"). In this instance, moreover, the historical evidence is particularly strong, given the fact that the Supreme Court has itself ruled on *qui tam* cases without questioning its Article III ability to do so. *See, e.g., Marcus*, 317 U.S. at 541-42; *Marvin v. Trout,* 199 U.S. 212, 225-26 (1905).

Standing doctrine focuses, in part, upon whether putative plaintiffs "[h]ave ... alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the

[5] Quorum failed even to cite these cases in its Memorandum in Support.

court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr,* 369 U.S. 186, 204 (1962). A *qui tam* action prosecuted by relators under the FCA satisfies this requirement. Adjudication of such a suit does not involve an academic inquiry into abstract questions of law. Rather, it involves the application of legal rules to a specific factual setting — the daily business of the federal courts. Nor can there be any doubt that the requisite adversity of interests exists. The relator in this case cannot be deemed to be suing merely to advance a philosophical or ideological agenda, but instead to collect a portion of the monetary recovery authorized by Congress. His desire to collect a financial award gives him a "concrete stake" in the outcome of the litigation. *See Hughes Aircraft,* 520 U.S. at 949 ("As a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good").

That relators personally suffer no judicially cognizable injury from the illegal conduct does not impact this standing analysis. The great majority of the Supreme Court's standing decisions have involved claims seeking injunctive or declaratory relief against governmental entities.[6] When the remedy sought is an injunction or declaratory judgment, the requirement that putative plaintiffs demonstrate injury from the challenged practice is equivalent to a requirement that they demonstrate a

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[6] See, e.*g*., *Allen* v. *Wright*, 468 U.S. 737, 746-47 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 469 (1982); *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 34 (1976); *United States* v. *SCRAP*, 412 U.S. 669, 678 (1973).

concrete stake in the litigation: only a person who is or will be injured by a particular governmental policy can benefit from an order requiring its cessation. See *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 572-73 (1992).

These rules have little relevance to the distinct situation where a plaintiff cannot demonstrate personal injury in fact from the defendant's misconduct, but indisputably possesses a concrete stake in the outcome of the lawsuit because she will receive a share of the Government's financial recovery. The Supreme Court has specifically noted the difference between these two types of claims. In *Lujan* the Court held that the plaintiffs lacked generalized citizen standing under the Endangered Species Act, 16 U.S.C. § 1531, but in doing so the Court noted that the litigation before it was not "the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff." 504 U.S. at 573; *see also Steel Co.*, 118 S. Ct. at 1018-19 (statutory penalties did not give standing where they were payable to the Treasury, not to the putative plaintiff). This differentiation makes perfect sense – it is abundantly clear that this Court faces a live "case or controversy," which it possesses full authority to settle. In no way does this matter resemble activity at the proverbial debating society, the resolution of which courts will not undertake. *See Valley Forge,* 454 U.S. at 472.

An obvious parallel to the rule that financial bounties can create derivative standing is the assignment of choses in action, after which courts routinely view the

assignee to have standing. *See Spiller v. Atchison, T & S.F. Ry. Co.,* 253 U.S. 117, 134-35 (1920); *Liberty Mutual Ins. Co. v. Davis,* 412 F.2d 475, 484-85 (5th Cir. 1969); *Jefferson County Pharmaceutical Ass'n, Inc. v. Abbott Laboratories,* 656 F.2d 92, 98 (5th Cir. 1981), *rev'd on other grounds,* 460 U.S. 150 (1983); *In re Fine Paper Litigation State of Washington,* 632 F.2d 1081, 1090 (3rd Cir. 1980). In assignment cases, as with *qui tam* actions, the litigant operates derivatively, relying on the transfer of rights from a person who has suffered injury. *See Kelly*, 9 F.3d at 748-49 ("FCA effectively assigns the government's claims to *qui tam* plaintiffs ..., who then may sue based upon an injury to the federal treasury," which is sufficient for standing purposes). Quorum's argument that the *qui tam* provisions of the FCA are not truly the assignment of a chose in action is, therefore, the proverbial straw man; it fails to undermine the obvious, and significant, parallels between the role of a *qui tam* relator and the assignee of a chose in action.

In the face of these arguments – that it is the injury to the United States that matters for standing purposes, and that relators have a derivative interest in FCA litigation from the *qui tam* bounty provisions – it is no surprise that every appellate court to address the issue has held that FCA relators have standing. *See Weinberger,* 557 F.2d at 460; *Kelly, supra*; *Kreindler & Kreindler*, 985 F.2d at 1154 (relator "stands in the shoes of the government, which is the real party in interest," and thus "the government's alleged losses from [the defendant's] fraud confer standing on [the relator]"); *United States ex rel. Berge v. Board of Trustees*, 104

F.3d 1453, 1457-58 (4th Cir.), *cert. denied*, 118 S. Ct. 301 (1997).

The Eleventh Circuit, too, has so held in a closely related context, *see Neher*, 11 F.3d 136, although the United States questions the reasoning of that case. In *Neher*, the Eleventh Circuit held that relators have a personal interest in FCA litigation, because they "suffer[] substantial harm and the *qui tam* provisions of the FCA are intended to remedy that harm," *id*. at 138, such that their claim to the FCA bounty survives the relator's death. Specifically, the court held that relators can suffer emotional strain, face employment problems, and face the Hobson's choice between being part of fraud or reporting fraud and suffering the consequences, and further that the financial burdens of bringing a *qui tam* action cause personal harm. *Id.* The court held, therefore, that "the FCA's *qui tam* provisions are intended to redress wrongs suffered by individual relators ..., rather than the general public." *Id.* The United States questions this reasoning, as it does not appear to be factually accurate in many *qui tam* cases. The end result, however, is the same – there is no constitutional problem with FCA relators having standing to pursue FCA actions.

b. The *Qui Tam* Provisions of the FCA Do Not Unconstitutionally Violate the Executive's Power Faithfully to Execute the Law.

Every appellate court to consider the question has held the Constitution's allocation of powers to the Executive not to be inappropriately undermined by the *qui tam* provisions of the FCA, that is that Congress has not overly subverted the Executives's authority to "take Care that the Laws be faithfully executed." U.S. Const. art II, § 3. *See Kelly*; *Kreindler & Kreindler*; *United States ex rel. Taxpayers*

Against Fraud v. General Elec. Co., 41 F.3d 1032 (6th Cir. 1994).

"[W]here an act of Congress arguably threatens the integrity of another branch's authority and independence, the proper separation of powers inquiry is whether Congress has "impermissibly undermined" the role of that branch." *Kelly*, 9 F.3d at 750, citing *CFTC v. Schor*, 478 U.S. 833, 856 (1986). Viewing the statute "as a whole," rather than focusing on individual snippets — as the *Morrison* Court held that one must, see *Kelly*, 9 F.3d at 752 — the question is "whether the qui tam provisions 'disrupt[ ] the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions[,] ... whether, within the meaning expressed in *Morrison* [*v. Olson*, 487 U.S. 654 (1988)], these provisions accord the Executive Branch 'sufficient control' over the conduct of relators to 'ensure that the President is able to perform his constitutionally assigned duties.'" Kelly, 9 F.3d at 751, quoting and citing *Morrison*, 487 U.S. at 695 (alterations in *Kelly*, further embedded citations and footnotes omitted).

"[B]ecause the statute gives the executive branch substantial control over the litigation," *Kreindler & Kreindler*, 985 F.2d at 1155, and *qui tam* relators have much less authority than independent counsels under the statute upheld in *Morrison v. Olson*, 487 U.S. 654 (1988), *Kelly*, 9 F.3d at 752 - 53 ("an independent counsel exercises broader investigative authority, prosecutorial discretion, and authority to use the resources of the U.S. government than does a *qui tam* relator"), every court

has held the *qui tam* provisions not to undermine inappropriately the Executive's power.

The United States has a host of means to limit the power of *qui tam* relators: A *qui tam* relator has no power to compel government officials to use federal resources to prosecute a False Claims Act suit; the decision whether or not to intervene and take over a case is entirely up to the Attorney General. Further, the Attorney General may move to dismiss a meritless *qui tam* action even without actually intervening in the case. See *Juliano v. Federal Asset Disposition Ass'n,* 736 F. Supp. 348 (D.D.C. 1990), *aff'd,* 959 F.2d 1101 (D.C. Cir. 1992). Accord *Kelly,* 9 F.3d at 753 n.10. And, she may intervene in a *qui tam* case and then dismiss it because its pursuit is not in the interests of the United States. See *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.,* 151 F.3d 1139 (9th Cir. 1998), *cert. denied*, 119 S. Ct. 794 (1999). Thus, "[t]he Government may dismiss [a *qui tam*] action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." 31 U.S.C. § 3730(c)(2)(A). The Government may also enter into a settlement with the defendant over the relator's objections "if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." 31 U.S.C. § 3730(c)(2)(B). Moreover, upon an appropriate showing by the Government, the trial court may limit the relator's right to call,

examine, or cross-examine witnesses, or otherwise participate in the litigation. 31 U.S.C. § 3730(c)(2)(C). And, whether or not the Government intervenes in the action, the court may stay discovery "upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts." 31 U.S.C. § 3730(c)(4).

This is certainly the "sufficient control" required by *Morrison.* Accord, *Kreindler & Kreindler*, 985 F.2d at 1155; *Kelly*, 9 F.3d at 754; *Taxpayers Against Fraud*, 41 F.3d at 1041. Viewing the FCA "as a whole," the fact that *qui tam* relators have the ability to commence litigation is not fatal, either — it is merely one datum to be weighed against the many ways by which the United States can control FCA litigation. *See Taxpayers Against Fraud*; *Kelly*, 9 F.3d at 754 ("[B]ecause the Executive Branch has power, albeit somewhat qualified, to end qui tam litigation, it is not significant that it can not prevent its start.").

c. The Appointments Clause Is Not Implicated by the *Qui Tam* Provisions of the FCA Because Relators Are Not Officers of the United States

No court has ever held that the *qui tam* provisions of the FCA violate the Appointments Clause of the Constitution (Art. II, § 2, Cl. 2). *See, e.g., Taxpayers Against Fraud*; *Kelly*. The Appointments Clause provides that the President:

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law[.]

Quorum argues that *qui tam* relators under the False Claims Act function as "Officers of the United States" whose litigation of suits pursuant to the statute violates the Appointments Clause. That contention is wrong.

Congress has not, in the words of the Appointments Clause, "established by Law" a government "Office" of informer or relator under the False Claims Act. To the contrary, the Act's *qui tam* provision is entitled "ACTIONS BY PRIVATE PERSONS" (31 U.S.C. § 3730(b)). It provides that a "person" may bring a civil action "for the person and for the United States Government." 31 U.S.C. § 3730(b)(1). This statutory language demonstrates that the "person" authorized to sue is separate from the "United States Government" and that he sues, at least in part, for his own benefit. *See Hughes Aircraft,* 117 S. Ct. at 1877. Neither the relator nor his attorney, moreover, is entitled to the benefits, or subject to the requirements, ordinarily associated with offices of the United States. These individuals do not, for example, draw a government salary, nor are they required to establish their fitness for public employment. Perhaps most important, neither the relator nor his attorney is legally or ethically required, in his conduct of *qui tam* litigation, to subordinate his own interests to those of the United States in the event that the two conflict.

These considerations ineluctably demonstrate that *qui tam* relators are not "Officers" within the meaning of the Appointments Clause. As used in the Clause, the concept of "Officer" has always been understood to "embrace the ideas of

tenure, duration, emolument, and duties." *United States v. Hartwell,* 73 U.S. (6 Wall.) 385, 393 (1868). Accord, *United States v. Germaine,* 99 U.S. 508, 511-512 (1878); *Auffmordt v. Hedden,* 137 U.S. 310, 327 (1890); *United States v. Maurice,* 26 F. Cas. 1211 (C.C.D. Va. 1823) (No. 15,747) (Marshall, Circuit Justice). *Auffmordt* and *Germaine* were cited with approval by the Court in *Buckley v. Valeo,* 424 U.S. 1, 125-126 & n.162 (1976).

Relying solely on *Buckley,* defendants contend that, because *qui tam* relators perform functions that, when performed by the Government, are committed by the Constitution to "Officers of the United States," the terms of the appointment of relators must comply with the Appointments Clause. The Appointments Clause, however, does not prevent Congress from effectuating the purposes of the False Claims Act by permitting private parties to assert a cause of action in federal court. The *Buckley* court held that, because the members of the Federal Elections Commission served in offices and conducted executive functions, they had to be appointed pursuant to the Appointments Clause. That is quite different from requiring that private persons who sue for themselves and simultaneously provide a benefit for the United States must also be Officers of the United States in office under the Appointments Clause.

It plainly is not true that only an Officer of the United States may file suit in federal court pursuant to a federal cause of action. In a multitude of federal statutes, Congress has provided a private right of action by which aggrieved parties

may vindicate their rights under federal law. The decision to afford a private right of action undoubtedly reflects Congress's desire to ensure that individual victims are compensated for their own losses. In addition, however, these provisions vindicate a societal interest in deterring and punishing violations of federal law by enlisting private individuals in the process by which the law is enforced.[7]

Indeed, one of the factors to be considered in determining whether Congress intended to authorize private actions in a particular statute is whether such an action would be "consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff." *Cort v. Ash,* 422 U.S. 66, 78 (1975); see also *id.* at 84.

Congress may, moreover, authorize remedies such as punitive damages to be awarded to private parties that serve no compensatory function, but are instead designed entirely to advance the public interest in punishment and deterrence.[8] *See, e.g., Smith v. Wade,* 461 U.S. 30, 51 (1983) (punitive damages may be awarded in suit under 42 U.S.C. § 1983 for "reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law"). No one could

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[7] Some of these statutes permit private parties whose only relationship to the United States is contractual to bring legal actions in the name of the United States. See, *e.g*., the Miller Act, 40 U.S.C. § 270a, *et seq*. (permitting suits by subcontractors against general contractors with the United States). Such legal actions, like the government contracts they enforce, serve the public interest without the private litigants being transformed into federal officers. See *United States* v. *Hartwell* (holding that public contractors do not hold offices under the United States).

[8] See *Memphis Community Sch. Dist.* v. *Stachura*, 477 U.S. 299, 306 n.9 (1986) ("[t]he purpose of punitive damages is to punish the defendant for his willful or malicious conduct and to deter others from similar behavior").

reasonably suggest that private plaintiffs who seek these forms of relief that serve a public interest thereby acquire the status of "Officers of the United States."

Insofar as the Appointments Clause is concerned, *qui tam* relators are analogous to plaintiffs who invoke a private right of action under any other federal statute. These individuals play an important role in the enforcement of federal law and the effectuation of congressional purposes, but are not thereby transformed into Officers of the United States.

The fact that a relator brings the *qui tam* action "in the name of the Government" (31 U.S.C. § 3730(b)(1)), is a procedural practice that in no way alters this analysis. The use of the "*ex rel.*" style in itself distinguishes *qui tam* suits from actions that are truly brought by and in the name of the United States. That caption alerts all concerned to the fact that the suit is actually being carried on by a relator. Habeas corpus actions brought by state prisoners in federal court, for instance, have often been styled "*United States ex rel. [State Prisoner] v. [State Warden].*" See, *e.g., United States ex rel. Jennings v. Ragen,* 358 U.S. 276 (1959); cases cited in *Townsend v. Sain,* 372 U.S. 293, 310 & nn. 7 and 8 (1963). That procedural practice manifestly does not implicate the Appointments Clause.

Simply because the majority of any recovery under the False Claims Act will go to the United States also does not transform the *qui tam* relator into an Officer of the United States. The Federal Water Pollution Control Act permits private plaintiffs who satisfy the requirements of Article III to seek, among other remedies, the

imposition of monetary penalties payable to the United States. *See* 33 U.S.C. § 1365. Yet, this provision has been repeatedly upheld against Appointments Clause challenges. See *Natural Resources Defense Council, Inc. v. Outboard Marine Corp.,* 692 F. Supp. 801, 815-17 (N.D. Ill. 1988); *Chesapeake Bay Found. v. Bethlehem Steel Corp.,* 652 F. Supp. 620, 624 (D. Md. 1987); *Student Public Interest Research Group of New Jersey, Inc. v. Monsanto Co.,* 600 F. Supp. 1474, 1478-79 (D.N.J. 1985). And, when the Supreme Court has been confronted with Section 1365 it has not even hinted at an Appointments Clause problem. See *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n,* 453 U.S. 1, 14-17 (1981)).

In short, *qui tam* relators have none of the characteristics associated with "Officers of the United States." They hold no government office, they draw no government salary, and in their own conduct of False Claims Act litigation they are not actually supervised by the Executive Branch. Although *qui tam* relators play an important role in the enforcement of federal law, and their actions often redound to the benefit of the United States, the same is true of private actors in a variety of contexts. Thus, they are not covered by the Appointments Clause. *See Taxpayers Against Fraud*, 41 F.3d at 1041 (the Appointments Clause is not applicable because a *qui tam* relator is not vested with any governmental power).[9]

[9] The Ninth Circuit in *Kelly*, 9 F.3d at 757-59, also so found, although its reasoning was somewhat different, and possibly inconsistent with *Buckley*. That court determined that the limited nature of the relators' task meant that it was "impossible to characterize the authority exercised by relators as so 'significant' that it must only be exercised" pursuant to the Appointments Clause. *Id*. at 758. Accord *Taxpayers Against Fraud*, 41 F.3d at 1041.

d. Relator's Continued Involvement in this Case after the United States Chose to Intervene Raises No Constitutional Concerns.

Quorum's final constitutional argument — that the relator's involvement after the United States chose to intervene violates the Due Process clause — is likewise without merit; opining policy while ignoring the text of the statute. Foremost, Quorum seems not to have read 31 U.S.C. § 3730(c)(2)(D), which provides that "[u]pon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation." In the face of this provision, Quorum raises a *facial* challenge to the *qui tam* provision in all cases where the United States has intervened, an argument the United States views to be meritless.

Beyond the fact that Quorum seems not to have read the FCA, their argument goes far beyond the one case they cite to support it. First — as the *Kelly* court stated, *see* 9 F.3d at 759 — *Marshall v. Jerrico*, 446 U.S. 238 (1980), did not find a due process violation in the facts before it, specifically noted that prosecutors need not be entirely neutral, and did not pronounce limits on the financial interests prosecutors might have. *See also United States ex rel. Robinson v. Northrop Corp.*, 824 F. Supp. 830, 838 (N.D. Ill. 1993) ("Plaintiffs in civil cases are allowed to be biased, and to argue zealously for their cause, because the tribunal hearing the case is impartial.") Furthermore, it is unclear whether the actions of *qui tam*

relators can raise due process concerns, since they do not hold public office and cannot wield the powers of government to prosecute their cases. *See Kelly*, 9 F.3d at 760; accord *United States ex rel. Fallon v. Accudyne Corp.*, 921 F. Supp. 611, 623 (N.D. Ill. 1995). But even were there to be some situation where such an argument might have merit, Quorum has no basis for an argument for facial invalidity on these grounds.

2. The United States Would Not Argue that the Relator is Barred from participating in this matter by the Public Disclosure Provision of the FCA

Questions of whether *qui tam* relators' suits are barred by the public disclosure bar of the FCA, 31 U.S.C. § 3730(e)(4), typically arise in two contexts. Where the United States has intervened in the lawsuit, as here, defendants argue that a relator violates the bar to avoid paying relators' attorney fees, and costs, which they would otherwise owe if the litigation is successful. 31 U.S.C. § 3730(d)(1). Where the United States has not intervened, defendants make the argument to avoid all liability. *See* Memorandum in Support at 15 n. 9. The United States may also argue in certain situations that a relator's participation would violate the public disclosure provisions, because the United States has an independent interest in ensuring that its statutes are enforced and in order to ensure that only relators who are qualified under the statute receive a share of FCA proceeds, a share that would otherwise go to the U.S. Treasury.

Given the circumstances of this case — an unfiled deposition in state court

litigation in which the United States was not a party and which was not known to the federal government — the United States would not argue that the public disclosure provisions bar relator's recovery. Although one appellate court has held that discovery material in private litigation never filed with a court counts as the "public disclosure of allegations or transactions in a criminal, civil, or administrative hearing," 31 U.S.C. § 3730(e)(4)(A), *see United States ex re. Stinson v. Prudential Ins. Co.*, 944 F.2d 1149, 1153 (3d Cir. 1991), the United States believes this holding is at odds with the text and purpose of the FCA and of its public disclosure bar. The purpose of the bar is to preclude private suits when the United States is either already acting on the information or can be deemed to have a sufficient amount of information that allows it to take action through, e.g., publication in the "news media." Every other appellate court to address the issue has disagreed with *Stinson*. *E.g.*, *United States v. Bank of Farmington*, 166 F.3d 853, 860-61 (7th Cir. 1999) ("[T]he language of the statute ... is 'public disclosure,' not 'potentially accessible to the public.' ... [B]arring actions based on information which was merely potentially but not actually opened up to view does not discourage parasitism. It only deters diligence in uncovering fraud."); *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 652 (D.C. Cir. 1994). The United States believes that unfiled discovery would qualify as a "public disclosure" if the United States were a party to the litigation, since, filed or not, the discovery would demonstrate that the United States was already aware of, and pursuing, the allegation. In these circumstances, no qui tam suit is necessary to redress loss to

the Treasury, and therefore Congress has barred such suits. Where the litigation is between private individuals, however, and the discovery is unfiled, there is no sufficient notice to the federal government and qui tam suits are both necessary and appropriate.[10/]

Conclusion

Based on the foregoing, the United States respectfully requests that the court deny defendants' Motion to Dismiss Relator as a Party to this Case in all respects.

Respectfully submitted,

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[10/] The United States disagrees with relator's argument that the United States' intervention cures a jurisdictional defect in relator's claims and urges the court not to rule in the relator's favor on this basis. *See Federal Recovery Services Inc. v. United States*, 72 F.3d 447, 452 (5th Cir. 1996); *United States ex rel. Foust v. Group Hospitalization and Medical Serv. Inc.*, 26 F. Supp.2d 60, 63 (D.D.C. 1998); *United States ex rel. Burns v. A.D. Roe. Co.*, 919 F. Supp. 255, 258-59 (W.D. Ky. 1996), *appeal pending*, No. 97-6044 (6th Cir.).